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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

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Dup. Ct.

No. 587

IN THE MATTER OF
DIVERSEY HOTEL CORPORATION,
AN ILLINOIS CORPORATION,
DEBTOR.

ABRAHAM KOSDON, SAM HAUSLINGER AND BENJAMIN LAPINE,
Petitioners,

vs.

DIVERSEY HOTEL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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February 9, 1948.

INDEX.

PAGE

Petition:

Summary Statement of the Matter Involved..... 2-4
Questions Presented 4-6
Reasons for Allowance of Writ..... 6-8
Prayer for Relief..... 8

Brief:

Jurisdiction Invoked 9
Opinion Below 9
A Statement of the Case.....10-16
Argument 17

Summary of Argument.

I. The property of the debtor was worth less than the amount due on the mortgage and the proceedings were for the purpose of Liquidation and not reorganization. The decision which approved such a petition as filed in good faith on a contest at the outset of the proceedings is irreconcilable with the view of this court.....17-27

II. The debtor was conceived in fraud and its petition was not filed in good faith and it was the duty of the court to dismiss its petition for lack of good faith.....27-32

(a) The conveyance from the Delaware Corporation to the Illinois corporation was to the prejudice of the beneficiaries and in breach of trust 28-29

(b) The issuance of all shares in the name of George W. Pearson was unwarranted and the debtor was not a bona fide corporation and its petition should have been dismissed.....29-32

III. The proceedings were commenced to prevent the distribution of the stock to the bondholders upon the maturity of the income bonds which would have resulted in a merger and enabled the holders of the securities to acquire the property without any proceedings and without the burdensome expenses attached thereto and the court clearly erred when it held that the petition was filed in good faith 32-35

(a) A merger is effected when the position of debtor and creditor is united in the same person 33

(b) Equity will enforce or prevent a merger where the intention is clear and when the prevention is in the interest of justice..... 33

(c) The prevention of the merger in the instant case is not in the interest of justice..... 33-35

Conclusion 36

Table of Cases.

Biltmore Grande Apts., 146 F. (2) 81 6
Biwer v. Martin, 294 Ill. 489 33
County Life Apts. v. Buckley, 145 F. (2) 935 .....6, 24
Commercial Merchants Nat. Bank & Trust Co. v. LeTourneau, 137 F. (2) 87 35
Donk v. Alexander, 117 Ill. 330 33
Fidelity Assurance Society v. Sims, 318 U. S. 608 .....6, 20
First Nat. Bank v. Bryn Mawr Beach Bldg., 365 Ill. 409 29
First Trust Co. v. Crooked Creek R. & Coal Co., 243 Fed. 450 34
Forthman v. Deters, 206 Ill. 159 33
Hammond v. Lyon Realty Co., 163 Md. 442 30
Hopkins v. Loeber, 329 Ill. App. 423 29
Loewer's Gambrinus Brewery Co., Re: 141 F. (2) 747 .6, 24
Lorraine Castle Apartment Bldg. Corp., 149 F. (2) 747 .6, 25
Marine Harbor Properties, 125 F. (2) 296 20
Marine Properties v. Trust Co., 317 U. S. 78 .....4, 6, 17
McDermott, Re: 115 F. (2) 582 33
North American Can Corp. v. Peerless Weighing and Match Corp., 143 F. (2) 938 18
Patent Cereals v. Flynn, 149 F. (2) 711 25
Price v. Spokane Silver & Lead Co., 97 F. (2) 237 29
St. Charles Hotel Co., 149 F. (2) 645 21
St. Louis Trust Co. v. W. C. W. R. Co., 334 Ill. 147 34
San Francisco Laundry Ass'n v. American Trust Company, 127 F. (2) 187 26

Other Citations.

Del. Code 1935, Sec. 65, p. 481 28
Smith Hurd Ill. Ann. Stat. Sec. 157.72 28

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the United States:

Abraham Kosdon, Sam Hauslinger and Benjamin Lapine respectfully pray the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to reverse its judgment of Janu-

ary 21, 1948, affirming the Order of the District Court for the Northern District of Illinois Eastern Division approving the voluntary Petition of the Diversey Hotel Corporation for corporate reorganization under Chapter X of the Bankruptcy Act as filed in good faith, to the end that its judgment may be reversed with directions to dismiss the proceeding for lack of good faith.

Summary Statement of the Matter Involved.

The Diversey Hotel Corporation was organized as a Delaware corporation in December 1932 under a reorganization plan (R. 5) which was then adopted by a protective committee consisting of five persons headed by George W. Pearson (R. 67). Under the plan the Delaware corporation acquired the property of the Illinois corporation and issued $1,387,500 in income bonds in exchange for the defaulted first mortgage bond of the same amount due June 1, 1947 together with 100 shares of stock which were to be held by the five members of the committee in trust, for distribution to the bondholders on a pro-rata basis at or prior to the maturity of the income bonds (R. 5, 74). The plan provided for a voluntary modification of the terms of the bond issue and for the sale of the property free and clear of the mortgage lien upon consent of the requisite number of the outstanding bonds. In the event of foreclosure all redemption rights were waived and the indenture trustee was authorized to purchase the property for the benefit of the bondholders if it did not obtain a fair price at the foreclosure sale, and it could organize a new corporation and issue stock in lieu of the bonds. On June 1, 1947 it became the mandatory duty of the trustees to distribute the stock to the bondholders (R. 14, 15, 17).

Without the knowledge or consent of the bondholders who were also the beneficiaries of the stock which was

held by the members of the committee in trust, the officers of the corporation created the debtor, The Diversey Hotel Company, as an Illinois corporation and had the Delaware corporation convey all of the property to the Illinois corporation on September 29, 1938 (R. 6). Instead of distributing the stock of the Delaware corporation or the proceeds thereof, the officers of the corporation issued the stock of the Illinois corporation to three strangers with an endorsement on the certificate that these strangers were to hold the stock in trust for the benefit of the bondholders under the same terms and conditions as the committee held the stock of the Delaware corporation (R. 85). Immediately thereafter these three strangers surrendered their stock to the corporation and all of the stock was re-issued to George W. Pearson, individually, under a similar endorsement that he was to hold the stock for the benefit of the bondholders under the same terms and conditions as they were to be held by the five members of the protective committee (R. 85). Pearson, as the sole stockholder thereafter, was the only person to give notice and to receive notice in connection with election of directors, and he, the one man corporation, elected the directors (R. 85). From the date of the reorganization in 1932 to the date of the filing of the Petition on May 29, 1947, two days before the maturity of the income bonds, not one cent was paid on the principal. No attempt was made to obtain a voluntary reorganization under the plan which was adopted by Pearson and the other members of the committee in 1932 at the cost of $31,429.31 (R. 63) but instead of this, he, Pearson, through his Board of Directors, filed the voluntary Petition for alleged corporate reorganization on the eve of the maturity of the bond issue when he was obligated to distribute the stock to the bondholders.

The good faith was contested at the outset by the

Petitioners (R. 12-20) who owned $21,000 of the income bonds and who are beneficiaries of the stock for the corresponding amount and who made a demand prior to the filing of the Petition for the distribution of the stock (R. 21). Evidence was heard by the Court which established that the property of the debtor is valued less than the debt due on the mortgage indebtedness, and that the main object of the proceedings was liquidation and not reorganization. The Court, however, approved the Petition as filed in good faith (R. 34) and the Court of Appeals affirmed its order (R. 110).

Questions Presented.

1. Whether in a contest on the good faith of a voluntary petition for reorganization under Chapter X of the Bankruptcy Act made at the outset of the proceedings under Sections 137 and 144 and the showing that the property of the debtor was worth less than the mortgage debt and its object was liquidation and not reorganization, it was proper to affirm the order below that the petition was filed in good faith for the reason that "the instant proceeding might be a crutch to carry the bondholder through" to "end" their "long period of convalescence," and whether such views are in harmony with the view of this court as expressed in *Marine Properties* v. *Trust Co.*, 317 U. S. 78; *Fidelity Assurance Society* v. *Sims*, 318 U. S. 608.

2. Whether a "breach of trust" and "breach of fiduciary integrity" on the part of the persons who plunged the corporation into bankruptcy to avoid the performance of their trust duties does not constitute lack of good faith.

3. Whether a corporation whose stock was wholly owned by the bondholders and there were no intervening

rights, may avail itself of voluntary proceedings under Chapter X of the Bankruptcy Act for liquidation purposes under the guise of reorganization, and whether the merger of the bonds into the stock upon the maturity of the income bonds which would have vested the title in the corporation free from the lien of bond issue, without requiring any reorganization, should have been prevented by the Court of Bankruptcy in approving the petition as filed in good faith.

4. Whether the reviewing Court may confirm a judgment below in disregard of the points raised on the appeal and without passing on the questions presented on review consisting of the following:

(1) Whether petitioner met the burden of proof to sustain its jurisdictional allegations when its good faith was contested at the outset under Sections 137 and 144 of the Act.

(2) Whether the persons who violated the provisions of the 1932 reorganization plan and committed a breach of trust when they caused the Delaware corporation to convey the property to the Illinois corporation, acted in good faith in filing the petition for a second reorganization.

(3) Whether it was the duty of the officers and directors of the debtor corporation to exhaust the provisions for a voluntary reorganization under the 1932 reorganization plan before throwing the debtor into reorganization under Chapter X encumbering the estate with the expenditures necessarily incurred under the Act.

(4) Whether the conveyance by the Delaware corporation, which only requires the consent of 51% of the stockholders to a sale or mortgage to the Illinois corporation, which requires the consent of two-thirds of the stockholders to a sale or mortgage, was a breach of trust in view of the fact that the stock was to be held by the Committee for the benefit of the bondholders with the limitation to distribute the stock

or the proceeds thereof, and the consent of the beneficiaries was not obtained to such transfer, and whether the filing of the petition by the Illinois corporation, which was conceived in fraud, was in good faith under the spirit of the Act.

(5) Whether the real purpose of the proceeding was liquidation and not reorganization and it was the duty of the court to dismiss the proceeding for lack of good faith,

all of which questions were embraced in the specification of the points relied on for reversal.

Reasons for the Allowance of the Writ.

1. The approval of the voluntary petition as filed in good faith upon the contest at the outset of the proceedings on a showing that the value of the property of the debtor was less than the mortgage debt and that the proceedings were not for reorganization, but for liquidation, and the affirmance of the order for the reasons advanced in the opinion that "the instant proceedings might be a crutch to carry the bondholders through to end their long period of convalescence", cannot be justified in view of the fact that the proceedings were not initiated by bondholders but by a "one-man corporation" on the eve of the maturity of the bond issue when he was to distribute the stock to the bondholders. The views expressed in the opinion are contrary to the views of this court as expressed in *Marine Properties* v. *Trust Co.*, 317 U. S. 78, and *Fidelity Assurance Society* v. *Sims*, 318 U. S. 608, as interpreted by the Second Circuit (re: *Loewer's Gambrinus Brewery Co.*, (2) 747; *County Life Apts.* v. *Buckley*, 145 F. (2) 9[illegible] well as by the Seventh Circuit in its previous opinions (*Biltmore Grande Apts.*, 146 F. (2) 81; *Lorraine Castle Apartment Bldg. Corp.*, 149 F. (2) 747.

2. The approval of a voluntary petition of a debtor as filed in good faith under Chapter X of the Bankruptcy Act on a contest at the outset of the proceedings in the face of the failure of proof to sustain the jurisdictional requirement as to "need for relief" and the proof that the object was not to reorganize but to liquidate cannot be reconciled with decisions of other circuits and with the decision of this court. The definition of good faith in the instant case, that good faith under the Act "is not the same as the alleged breach of fiduciary integrity" is a novel definition which is not in harmony with the definitions of the term by other courts.

3. The approval of the voluntary petition of the debtor, in the absence of proof to sustain the jurisdictional allegations, on the ground that some bondholders favored the reorganization proceeding because the proceedings "might be a crutch to carry the bondholders through" and "end" their long "period of convalescence" is based on a clear misconception of the scope and purposes of corporate reorganizations under Chapter X of the Bankruptcy Act, as it was not the purpose of corporate reorganizations to supply "crutches" to bondholders. Even if all the bondholders had filed a petition, it would have had to be dismissed for lack of good faith, when the basic jurisdictional requirements were absent. The "wish" of the bondholders holding $88,000 in bonds who supported the voluntary petition may not be a substitute for jurisdictional requirements which are absent. The affirmance of the order approving the petition as filed in good faith is not based on good faith as defined in Section 146 (3) but on good faith as defined in the Opinion which is not in accord with the view of this court. The writ should be issued to review such a decision.

4. The views expressed in the opinion that the issue

of good faith on a voluntary petition when assailed at the outset by creditors must be determined not by the allegation and proof, but by the wishes of creditors who believe "that something worthwhile can be saved from the wreck", by means of the proceedings which they themselves could not have maintained, is contrary to the views of this court.

Prayer.

For the foregoing reasons petitioners pray that a writ of certiorari issue out of this court to the United States Circuit Court of Appeals for the Seventh Circuit directing said court to certify and send to the court on a date to be determined, a full and complete transcript of the record and of all proceedings there had in this case, to the end that the case may be reviewed and determined by this court, that its judgment and decision be reversed with directions to dismiss the proceedings for lack of good faith and that your petitioner be granted such other and further relief as may be proper.

ABRAHAM KOSDON, SAM HAUSLINGER,
and BENJAMIN LAPINE,
Petitioners.

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and
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Respondent.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction Invoked.

The judgment of the United States Circuit Court of Appeals was rendered January 21, 1948, and the jurisdiction of this court is invoked under Judicial Code Section 240 (a) 28 U. S. C. A. Section 547 (a) as amended by the act of February 13, 1925.

Opinion Below.

The opinion of the Court of Appeals is not yet reported and is printed in the record (pp. 104-109).

A STATEMENT OF THE CASE.

The petition involves the approval of a voluntary petition to reorganize the Diversey Hotel Corporation under Chapter X of the Bankruptcy Act on a contest at the outset of the proceedings by petitioners on the issue of good faith. The matter was heard upon the petition, the answer, and evidence both oral and documentary. The court approved the petition as filed in good faith and the Court of Appeals affirmed the decision below.

The Petition:

The petition alleged (R. 2-5) that the debtor was an Illinois corporation and its assets consist of two buildings: (1) an office building and (2) a hotel valued at $1,450,000, and together with other assets the total value of the debtor's property is $1,512,902.79 against liabilities of $1,424,578.74. The Corporation issued 100 shares of $10 par value each in the name of George W. Pearson, its president, which he holds for the benefit of the first mortgage bondholders in the amount of $1,387,500.00.

In stating the "History of the Property" the petition alleged (R. 5) that the property was foreclosed in 1932 for the debt on First Mortgage Bonds of $1,387,500, at which time the Diversey Hotel Corporation (a *Delaware* corporation) was organized which purchased the property at the foreclosure sale under a Reorganization Plan which was adopted by a Protective Committee. The Company issued new Income Bonds in exchange for the old 6% Bonds. Its common shares were issued in the name of the Committee whose members became the directors of the corporation headed by George W. Pearson, its chairman, with authority to distribute it pro rata among the bondholders

or to sell the stock and distribute the proceeds among them. The stock had not been sold nor distributed to date and is held by Pearson for the benefit of the bondholders. On September 29, 1938, the *Delaware* corporation conveyed the property to an Illinois corporation which assumed the bonded debt of $1,387,500 maturing June 1, 1947. The company had no funds to meet the payment of the bonds at maturity.

The Petition was filed on May 29, 1947 (two days before the maturity of the bond issue) and alleged that there were no other proceedings pending either in the State or Federal Court for reorganization or foreclosure, except a suit for damages under the Dram Shop Act. It alleged (R. 6: ¶ 8) the "need for relief" and that its assets were valued in excess of its liabilities but it was unable to meet the payments as they matured, and under the Act it would salvage most, if not all, of the intrinsic value of its equity and the creditors would not be obliged to sacrifice their claims in a foreclosure sale or in a straight bankruptcy proceeding, and it desired that a Plan of Reorganization be effected under the Act.

The Answer:

The answer of the appellants, secured creditors to the extent of $21,000.00 (R. 19-20), challenging the good faith of the petition under Sections 137 and 144 of the Act, alleged (R. 12: ¶ 2) that the directors of the Corporation were without power to vote in favor of the filing of the petition because of the violation of their duty to distribute the stock or proceeds to the bondholders and they had no right to act in behalf of the corporation. It denied (R. 14: ¶ 8) that the value of the debtor's property was $1,450,000, denied its solvency, and denied that its assets are in excess of its liabilities. It denied (R. 14: ¶ 8) that there

was any need for reorganization under Chapter X, and asserted that reorganization was possible under Section 5 of Article XI of the Trust Indenture which was executed pursuant to the 1932 reorganization plan authorizing 80% of the outstanding bonds to alter or amend its provisions; that relief was also obtainable under Section 4 of Article VI of the Trust Instrument under which the corporation waived its right of redemption, and further relief was available under Section 5 of Article X which authorized the trustee to purchase the property at the foreclosure sale for the benefit of the bondholders and to issue stock under a trust or a corporate form. Relief was also available by a partial sale without consent, or by the sale of the whole property by consent of 75% of the outstanding bonds.

The answer further alleged (R. 16-18) that the assets of the debtor were valued at less than the amount due on the bond issue and that only a liquidation may be accomplished in these proceedings for the sole benefit of the secured creditors and not a reorganization in the real sense, and the petition was, therefore, not filed in good faith; that (R. 19) the filing of the petition was not in good faith because the corporation ceased to function; that the directors of the corporation were merely custodians for the shareholders whose shares were to be distributed under the plan and they were without power to act; that the shareholders were prevented from operating its business since the reorganization in 1932 and that the filing of the petition was in furtherance of the attempt of the directors and officers to perpetuate themselves in office.

Petitioner's Evidence:

The only evidence in support of the petition which was offered by the Petitioner consists of four documents (Exhs. 1-4). Three of these exhibits are letters written by the

Bondholders Protective Committee to the bondholders during the period commencing May 16, 1933 to January 30, 1935, and the fourth exhibit is the Trust Agreement (R. 92) which was executed June 1, 1932 under the Reorganization Plan and to which the court authorized a reference without reprinting it.

The first letter dated May 16, 1933 (R. 72; Exh. 3) shows that the Committee consisted of George W. Pearson, Chairman, W. C. Collings, Ralph DeSwarte, E. Rahtjen and Harry L. Schmitz, and the Continental Bank was the depositary of the Committee. The Committee stated in its letter (R. 74) that it organized the Diversey Hotel Corporation under its Plan of Reorganization to acquire the property at the foreclosure sale and that the Corporation would issue new Income Bonds in exchange for the old bonds. In its second letter, dated June 1, 1934 (R. 67; Exh. 2) it stated that the Diversey Hotel Corporation was organized in December, 1932 and that the members of this Committee were elected Directors of the company. Upon the completion of the foreclosure the title to the property became vested in Diversey Hotel Corporation, and "the banker members of the Committee felt they should be replaced on the Board by bondholders or experienced real estate operators" and "accordingly, on December 19, 1933, Messrs. George W. Pearson, Ralph P. DeSwarte and Harry L. Schmitz, resigned from the Board of Directors of Diversey Hotel Corporation and the vacancies so created were filled by the election of Carleton L. Elmes and George Donnersberger, holders of Certificates of Deposit for substantial amounts of bonds and Francis Manierre, a well known real estate operator." It also stated that the Corporation acquired title to the property on January 3, 1933 and that the Committee did not know definitely when the new securities would be issued in exchange for the old securities. In its third letter, dated January 30, 1934 (R. 61;

Exh. 1) the Committee informed the bondholders that each of the new bonds contained the following legend (R. 62):

> "In accordance with the plan of March 22, 1932, pursuant to which plan this bond was issued, at the time of issuance of this bond all of the capital stock of the Diversey Hotel Corporation was retained by a committee acting for the benefit of the holder of this bond and the holders of all other bonds secured by the Trust Indenture referred to in the within bond. At such time as the Committee holding such stock shall distribute the same the then registered owner of this bond shall be entitled to receive his pro rata share thereof."

and that on the basis of the then rentals it was estimated that there would be paid at least ½ of 1% on June 1, 1935 on account of interest on the new bonds.

No evidence was offered by the Petitioner on any of the jurisdictional allegations contained in the petition, and none of the exhibits have any bearing on proof of the petitioner.

Evidence in Opposition:

The evidence of the appellants showed (R. 84) that prior to the filing of the petition the directors adopted a resolution to obtain the consent of the bondholders to an extension of the Income Bond Issue, which resolution was never rescinded. When the Diversey Hotel Corporation (the *Delaware corporation*) conveyed its property to the Diversey Hotel Corporation (the *Illinois corporation*) the shares were issued to three persons, in compliance with the Illinois law, on October 1, 1938. One share was issued to M. Barton, one share to M. J. Fink, and 98 shares to B. P. Hayes. All of these shares were immediately canceled and 100 shares were issued to George W. Pearson. He is the sole stockholder of the debtor corporation, and the stock is still in an envelope in the corporate book (R. 85). Each

of the certificates when originally issued contained the following endorsement:

> "This Certificate issued subject to the terms and conditions contained in Section Eight (8) of Article One (1) of the Trust Deed dated June 1, 1932, executed by the Diversey Hotel Corporation and the Continental Illinois National Bank & Trust Company of Chicago, as Trustee."

and the certificate issued to Pearson contain a similar endorsement (R. 85).

On August 22, 1946, an offer of $1,200,000 for purchase of the property was made. The offer was rejected by the Board of Directors, without consulting the bondholders. The reason given for the rejection was that the Corporation had obtained an appraisal from the Chicago Real Estate Board showing the value of the property to be $1,350,000, and the amount of the indebtedness was $1,387,500 (R. 86). On September 20, 1946, at a special meeting of the "stockholders" (*which consisted of Pearson, the sole stockholder*) it was decided (R. 87) to abandon a proposition for the sale of the stock, and to submit to the bondholders a program of extension and part payment in cash (R. 88-89). On December 10, 1946 the Illinois corporation first assumed the liability of the Delaware corporation to pay interest, and the attorneys were instructed to prepare a draft to amend the charter of the Corporation towards a program of voluntary reorganization (R. 87). The directors also caused the property to be advertised for sale on April 15, 1947 (R. 23; Exh. C). Thereafter, on May 29, 1947 there was a special meeting of the Board (R. 90) and its attorneys reported that the sale of the property fell through, and (R. 91) that they thought "it's too late now to consider making any sale" because nobody would go into it "between now and the first of the month, with the intervening holiday tomorrow, and make any kind

of a deal," and under the circumstances they recommended the filing of the petition under Chapter X "with a view toward developing a program of reorganization that will permit" the substitution of "some single type of security that could be sold with a degree of freedom from the complications that exist under the present reorganization plan"; that (R. 93) they "have prepared a petition for this purpose" which they "are handing" to the Board "now" and asked them to "look it over and make such appropriate resolutions as you may see fit to pass under the circumstances." The resolution prepared by them to file the petition was then adopted (R. 97) and filed on the same day.

ARGUMENT.

I.

The Property of the Debtor Was Worth Less Than the Amount Due on the Mortgage and the Proceedings Were for the Purpose of Liquidation and Not Reorganization. The Decision Which Approved Such a Petition as Filed in Good Faith on a Contest at the Outset of the Proceedings Is Irreconcilable With the View of This Court.

The good faith of the petitioner was challenged at the *outset* under Sections 137 and 144 (R. 12-120). The allegation that the assets of the debtor exceeded the value of the mortgage indebtedness was challenged (R. 18) and it was asserted that "the assets of the debtor" were worth "less than the first mortgage indebtedness" and that (R. 19) the proceedings were for "liquidation" and not filed in good faith. On such a contest, the debtor *had the burden* of proof (*Marine Properties* v. *Trust Co.*, 317 U. S. 84, 85). It did not offer *any* evidence tending to sustain the allegations. On the other hand the proof showed that *the value of the assets was $1,350,000* (R. 86) against an indebtedness of $1,387,500, and there were no other intervening rights as the stock of the debtor was held for the bondholders (R. 5). For the purpose of showing good faith the petition alleged that the real estate was valued at $1,450,000 and that together with other assets the whole property of the debtor was worth $1,512,902.72 (R. 5) against liabilities of $1,424,578.74. The proof shows that on August 22, 1946 the debtor's property *was appraised at $1,350,000* which was *less* than the bond issue of $1,387,500 (R. 86). Even if there be added to the $1,350,000 the $45,409.43 in cash,

the $1,069.22 in "accounts receivable", the $5,139.64 in "premiums on insurance" and $11,284.43 in "deferred tenant alterations", the total assets amounted to $1,411,-833.50 as against a total liability of $1,424,578 (R. 5). That the real object of the proceeding was *not* for reorganization but for "liquidation" appears from the statement of the attorneys who prepared the petition who in urging the Board to vote for its filing stated (R. 91): "Under the circumstances" they "both feel" that they "can only recommend to the corporation that it file a petition to reorganize under Chapter X with a view toward developing a program of reorganization that will permit you to have some single type of security that could be sold with a degree of freedom from the complications that exist under the present trust indenture and the present reorganization plan." It was not the object to give the corporation a new start in life, which is the purpose of Chapter X, or "a new career" (*North American Can Corp.* v. *Peerless Weighing and Match Corp.*, 143 F. (2) 938), but its object was to simplify the liquidation and it is apparent that there was nothing for the stockholders because the bondholders themselves were the stockholders.

In discussing the "good faith" of the debtor in filing the voluntary petition the opinion finds support in the desire of the "creditors" who did not and could not have filed an involuntary petition, and it referred to instances where "creditors whose investment has turned sour" and "to save something of the wreck" are resorting to "cause a petition to be filed" and in such a case the question of good faith on the part of such creditors is involved and that is what is meant by good faith to "avoid the milking of the embarrassed debtors" and "the enrichment of a few professional reorganizers possessed of mischievous hungry proclivities." To this end the opinion says the District Court is charged with the duty of preventing this misuse

by the test of good faith. The court lost sight that while the term "good faith" may include the matters suggested by the court, it does not exclude the test defined in Section 144 and even in cases where creditors have the best intentions, and where debtors honestly believe that the proceedings would serve the best interest of the creditors, a petition is not filed in good faith when no reorganization but liquidation must be the ultimate end and such good faith may be challenged by a single creditor and must be dismissed irrespective of the large number of creditors who may desire it and of the benefits which may result therefrom.

While it may be true, as said in the opinion (R. 107), that the phrase "good faith" is not a term of precise or restricted meaning and it must find its correct connotation in the facts and in the field wherein it is used, yet a court may not go far afield as to hold that where there was no good faith because it appeared that the ultimate result would lead to liquidation, that such a petition should nevertheless be approved as filed in good faith. When it appeared from the evidence that the value of the assets was less than the debt due on the first mortgage and that there were no intermediary rights as the bondholders were, themselves, the stockholders and the inevitable result was liquidation, it became the duty of the District Court to dismiss the proceedings without regard to the wishes of the creditors who aligned themselves with the debtor under the definition of good faith by this court in construing the statutory definition.

The test whether a voluntary petition is filed in good faith is not determined by the desire of creditors who could not have invoked the voluntary or involuntary proceedings and who come to the support of the debtor. It is the good faith of the debtor which filed the voluntary

petition which is in issue and not the good faith of the creditors who come to its aid, and the issue can only be determined upon the contest of the creditor irrespective of the desires of other creditors (*Re Marine Harbor Properties,* 125 F. (2) 296, 299).

The affirmance of the order approving the petition as filed in good faith in the face of the evidence that the ultimate result would lead to liquidation, cannot be reconciled with the views of this court.

In *Fidelity Assurance Society* v. *Sims,* 318 U. S. 608, the Supreme Court construed the "good faith" provision of Chapter X, and said (p. 615):

> "Section 144 requires that if the Judge is not 'Satisfied' that the petition 'has been filed in good faith' he shall dismiss it. The relevant portions of 146 are that a petition shall be deemed not to be filed in good faith if * * * (3) *it is unreasonable to expect that a plan of reorganization can be effected;* or (4) a prior proceeding is pending in any court and it appears that the interest of creditors and stockholders would be best subserved in such prior proceeding." (Italics ours.)

The provisions as to "good faith" under Chapter X are also discussed in *Marine Properties* v. *Trust Co.,* 317 U. S. 78. There, the court said (p. 83) *that the burden is cast upon the petitioner to show that the proceeding was filed in good faith,* and that "Congress in effect directed the bankruptcy courts not to approve petitions under Chapter X in such cases unless it appears that the interests of creditors and stockholders would not be best subserved in the prior proceeding and *it put the burden on the petitioner to make that showing".*

In *Marine Properties* v. *Trust Co.,* 317 U. S. 84. At p. 85 the court said:

"We are of the opinion, however, that *the debtor did not sustain the burden which the federal statute places on a petitioner.* * * * 'Admittedly, the property is worth less than the amount of the first mortgage indebtedness. Under the rule of *Northern Pacific Ry. Co.* v. *Boyd*, 308 U. S. 106, *a plan of reorganization would not be fair and equitable which in such circumstances admitted the stockholders made a fresh contribution in money or in money's worth, in return for "a participation reasonably equivalent to their contribution"* ' (*Case* v. *Los Angeles Lumber Co., supra*, p. 121. *That rule obtains under Chapter X as well as under its predecessor*, § 77B. There is no suggestion in the record that the equity owners desire to make a contribution on that basis, and that, *unless they are allowed to do it, under Ch. X, they will be barred.* * * *

Ch. X would not permit such a dilution of creditor's interests. Hence, such a showing does not establish on behalf of the stockholders that 'need for relief' which § 130 (7) read in the light of § 146 (4) requires. In fact, *the approval of the petition on that ground would be giving the equity owners a nuisance value* wholly unjustified by the reorganization standards which are incorporated into Ch. X." (Emphasis ours.)

The question was presented to the Third Circuit in *St. Charles Hotel Co.*, 149 F. (2) 645, and instead of writing a new opinion, the court stated that the opinion of the trial court (60 F. Supp. 322) was "an excellent opinion" which it *adopted* in lieu of its own, and certiorari was denied by the Supreme Court (66 S. Ct. 48). There the District Court originally approved the petition under Chapter X as filed in good faith and upon a motion to show cause why the order should not be vacated on the ground that it was unreasonable to expect that a Plan of Reorganization can be effected under the provisions of that Act, the Court vacated the order and dismissed the proceedings.

It pointed out (p. 325) that Section 146 of Chapter X defined the term of "good faith" by showing that in a prior proceedings the interest of creditors and stockholders could not be best served except in the reorganization proceeding and it referred to the "most recent complete expression" in *Marine Harbor Properties* v. *Manufacturers' Trust Co.*, 371 U. S. 78, where the property sought to be reorganized was worth less than the first mortgage debt and this Court there held "that the debtor petitioning under Chapter X had not sustained the burden which was upon it to show that the interests of the creditors and stockholders would best be served in the Chapter X proceeding where there was a prior State foreclosure proceeding pending." The District Court pointed out that when the answer contesting the good faith of the petition was filed it became "the burden of such petitioner to demonstrate that his petition is filed in good faith." In disposing of the contention there made that it was proper to file a petition which sought to reorganize the property for the benefit of only *one* class, the secured creditors, and in holding adversely to that decision the Court said (p. 328):

> "It was contended in the *Marine Properties* case, as it is contended by the Securities and Exchange Commission in this case, that there are numerous safeguards contained in Chapter X that are lacking in the state court proceedings. In that case the Schackno Act of New York, N. Y. Laws 1933, c. 745, Unconsol. Laws N. Y. § 4871 *et seq.*, was involved, whereas we are concerned with proceedings authorized under the New Jersey law in insolvency, receivership and reorganization. Title 14, Chapter 14, Revised Statutes of New Jersey of 1937, N. J. S. A. 14:14. We need not examine the differences between the two procedures, for the Supreme Court fully answers this contention as follows: 'Those considerations would be highly relevant and persuasive if this was a case of the usual reorganization proceeding dealing with

more than one class of securities under the older procedures which Ch. X was designed to improve and supplant * * *. Then the safeguards afforded by Ch. X would have special significance in protecting the respective classes of investors against improvident, unfair or inequitable adjustments, compromises, and settlements—steps which are basic to the reorganizaiton process but which in selfish hands led to much abuse."

The Court further said:

"In the language of the Supreme Court: 'In view of the burden on a petitioner to make the showing required by § 130 (7) and § 146 (4), the bankruptcy court is not warranted in assuming without more than a state foreclosure proceeding instituted for and on behalf of the first mortgage creditors exclusively is inadequate, measured by Ch. X standards, to protect their interests. The contrary course would result in Ch. X making greater inroads on prior proceedings than § 130 (7) and § 146 (4) indicate was the purpose.' *Marine Harbor Properties* v. *Manufacturer's Trust Co.*, 317 U. S. 78, at page 88, 63 S. Ct. 93, at page 98, 87 L. Ed. 64.

In fact, it appears from the record that if a plan of reorganization is effected it could consist of no more than an equivalent to a foreclosure of the rights of all creditors and stockholders other than the first mortgage bondholders. Whether the corporation be liquidated and the lienors paid off, whether foreclosure proceedings be taken and the property sold to the lienors, or whether the first mortgagees convert their bonds into stock as evidence of their ownership, the effect and net result would be the same—the first mortgage bondholders alone may participate in the proceedings and determine the ultimate form of their holdings."

It held that that petition was improperly approved as filed in good faith and vacated the previous order and

cited (p. 329) *Fidelity Insurance Association* v. *Sims*, 318 U. S. 608.

In Re Loewer's Gambrinus Brewery Co., 141 F. (2) 747, the Second Circuit said (p. 749):

> "Our decision in *Frank* v. *Drinc-O-Matic*, 136 F. 2d 906, is authority for the order of sale appealed from unless the opinion of Justice Roberts in *Fidelity Assurance Ass'n* v. *Sims*, 318 U. S. 608, 63 S. Ct. 807, 87 L. Ed. 498, stands in the way. But that opinion would not seem to have any bearing on the situation here. It merely states that a *petition for reorganization where liquidation*, and not a readjustment of the rights of creditors, *was at the very outset* the only possibility, *should be dismissed*, as not filed in good faith. The petition was attacked at the outset on the ground that it was not filed in good faith and the Supreme Court held that to institute a proceeding under Chapter X in case where there was no chance of reorganization was a violation of the statute. The Supreme Court said (318 U. S. at page 622, 63 S. Ct. at page 814):
>
> " 'Congress did not intend a Chapter X case to be turned into a liquidation proceeding at the outset, but intended the litigation to become a straight bankruptcy only after the failure to consummate a plan, and meant to limit the parties to their remedy in ordinary bankruptcy in all other cases.' "

This was restated in *Country Life Apartments* v. *Buckley*, 145 F. (2) 935, where the court said (p. 938):

> "Appellants also contend that the trustees' plan could not be confirmed in reorganization proceedings, because it was in reality not a plan of reorganization, but only a means of effecting the complete liquidation of the debtor's property, within the condemnation of *Fidelity Assurance Ass'n* v. *Sims*, 318 U. S. 608, 63 S. Ct. 807, 87 L. Ed. 1032. *That case, however, held merely that a petition is not filed in good faith where liquidation, and not a readjustment of the rights of credi-*

tors, was at the very outset the only outcome to be expected. There the petition was attacked for lack of good faith in the initial stages of the proceedings and the Court held that a proceeding could not be instituted under Chapter X where there was no chance of reorganization."

These views were repeated in *Patent Cereals* v. *Flynn,* 149 F. (2) 711, 713, where the Court said:

> "Finally, we cannot take the view of the District Judge that the opinion of Justice Roberts in *Fidelity Assurance Ass'n* v. *Sims,* 318 U. S. 608, 63 S. Ct. 807, 812, 87 L. Ed. 1032, required him to dismiss the reorganization proceeding under Chapter X and to proceed with the pending bankruptcy proceeding against the debtor. In *Fidelity Assurance Ass'n* v. *Sims, supra,* it was found that the petition for reorganization under Chapter X had not been filed in good faith because from the very outset it was apparent that no readjustment of the rights of creditors was possible and that 'the interests of creditors would be best subserved in the pending prior proceeding in West Virginia and other states.' See our opinions in *Re Loewer's Gambrinus Brewery Co.,* 2 Cir., 141 F. 2d 747, 749, and *Country Life Apartments* v. *Buckley,* 2 Cir., 145 F. 2d 935, 938, quoted as distinguishing *Fidelity Assurance Ass'n* v. *Sims* in *Matter of Lorraine Castle Apartments Bldg. Corp.,* 7 Cir., 149 F. 2d 55."

Even the Seventh Circuit adopted these views in *Lorraine Castle Apartment Bldg. Corp.,* 149 F. (2) 55, and there it held that where the petition was *contested at the outset,* and not after its approval, that the petition must be dismissed on appeal for want of good faith when it appears that the purposes are for liquidation and not reorganization. It also held on similar facts that such a petition was not filed in good faith (*Biltmore Grande Apartments,* 146 F. (2) 81, 83).

There was no contention that there was to be any new

contribution by a "stockholder" which is one of the essentials when the assets are valued at less than the secured debt (*Re Van Sweringen Corp.*, 155 F. (2) 1009, 1012) and here there were no stockholders in the real sense.

In *San Francisco Laundry Ass'n* v. *American Trust Company*, 127 F. (2) 187, the court construed the meaning of "good faith" and held that under Sections 144 and 146 (3), where it appeared that a debtor was insolvent, and that there is no reason to expect that a reorganization which is fair can be approved, the proceeding must be dismissed for want of good faith. There, the court said (p. 188):

> "The conclusion reached below was *that its value is substantially less than the obligation secured;* and the finding has ample support in the record. In the light of this finding and the admitted situation otherwise, *it is plain that the debtor is insolvent in the bankruptcy sense; and that there is no reason to expect that a reorganization can be effected. Hence the proceeding was not instituted in good faith* (§ 146 (3)) of the Act, 11 U.S.C.A., § 546 (3), and the dismissal was proper, (§ 144, 11 U.C.A.A. § 544). See *Chapman Bros. Co.* v. *Security First Nat. Bank of Los Angeles*, 9 Cir. 111 F. (2d) 86; *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 60 S. Ct. 1, 84 L. Ed. 110." (Emphasis ours.)

There is not a word in the opinion on the main issue on which the appeal was taken and it is clear that the approval of the petition as filed in good faith cannot be reconciled with the views of this court as interpreted by the various circuit courts of appeal.

The opinion relies a great deal (R. 108) on the fact that "other creditors came into court and joined the petitioners" and "the opposition was limited to a negligible number of claims" and those "supporting the petition are manyfold times as large as the opposing creditors". Sec-

tion 137 does not require a large group of creditors to challenge the good faith of a petitioner. The fact that other creditors came in to support does not count. The only creditors that came in to support are holders of $88,000 of the bonds as against the $21,000 owed by the petitioners here. The opportunity for creditors to speak will first come up when the matter will be submitted to vote. The court could not tell in advance that "two thirds" will support it as it evidently assumed (R. 109). On the issue of good faith the contest is only between the petitioner and the creditor who challenges the good faith and the coming in of other creditors in support of the petition cannot even be considered.

II.

The Debtor Was Conceived in Fraud and Its Petition Was Not Filed in Good Faith and It Was the Duty of the Court to Dismiss Its Petition for Lack of Good Faith.

The Protective Committee created the *Delaware* Corporation under its Plan of Reorganization. The members of the Protective Committee were to hold its stock for the benefit of the bondholders and their power was *limited* to *sell* the stock and *distribute* its proceeds or to *distribute the stock* pro rata (R. 62). In its letter of May 16, 1933 the Committee wrote to bondholders (R. 67) that now that the foreclosure was completed and the reorganized corporation acquired title to the property "the banker members of the Committee felt they should be replaced on the Board by bondholders or experienced real estate operators" and therefore "George W. Pearson, Ralph P. DeSwarte and Harry L. Schmitz resigned" and other persons, holders of "substantial" amount of bonds and a "well known real estate operator" replaced them.

It appears from the Petition (R. 6) that on September 29, 1938 an Illinois corporation was organized *under the*

same name and the property was conveyed to the Illinois corporation. One hundred shares were originally issued to three persons who *were not members of the committee* and later *all* of the 100 shares were issued to George W. Pearson for the benefit of the bondholders (R. 85). *This conveyance in 1938 from the Delaware corporation to the Illinois corporation was void.* The right of the Protective Committee to hold the stock was either to sell the stock or to distribute it pro rata among the bondholders. *They had no power to convey the property and to issue the new stock to Pearson.*

(a) The conveyance from the Delaware corporation to the Illinois corporation was to the prejudice of the beneficiaries and in breach of trust.

The creation of the Delaware corporation in 1932 was not an empty gesture. The evident reason for the organization of the Delaware corporation was to simplify a sale or mortgage of the property in the event of the distribution of the stock, as under the Delaware law a *majority vote* is sufficient for such purposes (Del. Code 1935, Sec. 65, p. 481). By the conveyance to the Illinois corporation they made it impossible to sell or mortgage without a two-thirds affirmative vote (Smith-Hurd Ill. Ann. Stat. Sec. 157.72). The Committee was only empowered (Tr. 28) to *hold* the stock "for the benefit of all holders of the First and Second Mortgage Bonds" and the "authority" was limited "to distribute the stock" of the company "pro rata" or "to sell the stock and apply the proceeds to the retirement of bonds" or "to distribute such proceeds pro rata among the bondholders." *The conveyance from the Delaware corporation to the Illinois corporation which completely wiped out the stock of the Delaware corporation was not within the powers conferred upon the Committee, and was wholly void.* The debtor, the Illinois corporation which was thus

conceived in fraud, is not such a corporation which can avail itself of the benefits of the Bankruptcy Act. It was not the intent of Congress to permit reorganization of "corporate cripples" which are "fit subjects for liquidation" (*Price* v. *Spokane Silver & Lead Co.,* 97 F. (2) 237).

(b) The issuance of all shares in the name of George W. Pearson was unwarranted and the debtor was not a bona fide corporation and its petition should have been dismissed.

Under the 1932 Plan of Reorganization *all* of the capital stock of the corporation was to be held by a committee composed of *five* members for the benefit of all bondholders (R. 28). The committee then consisted of five members of which George W. Pearson was its chairman (R. 61). Three of the members of this committee, the "banker members", including Pearson, *resigned* and they were *replaced* by others (R. 67). The original five members, and their successors *were to hold all of the stock for the benefit of the bondholders and to distribute it.* The committee of *five* became the trustees for the bondholders (*First National Bank* v. *Bryn Mawr Beach Bldg.,* 365 Ill. 409, 423). The *five* members of the committee were required to act *jointly* (*Hopkins* v. *Loeber,* 329 Ill. App. 423, 429). They had no right *to delegate their powers* or transfer such rights to *strangers* consisting of M. Barton, M. J. Fink, and B. P. Hayes to whom the Illinois corporation issued its stock to be held for the benefit of the bondholders (R. 85) nor did they have the authority to delegate their powers and duties to the only "banker member," George W. Pearson, who "resigned" and through some maneuver became the *only* stockholder, the president, and one of the directors. This is the most unusual corporate set up. *The entire corporation consists of one man.* He holds all the stock for all bondholders and *there is no authority shown anywhere*

how he became the trustee for them. The only authority under the Reorganization Plan was the issuance of the stock of the Delaware corporation to the *committee of five* and there was no authority to organize a new corporation, to issue new stock, and to have the stock issued in the name of one person, Pearson, and to entrust him with *all* the functions of the corporation.

In *Hammond* v. *Lyon Realty Co.*, 163 Md. 442, the court discussed the question whether a corporation which consists of only *one* stockholder may properly be considered *a functioning corporation* and in holding to the contrary, the court said (p. 450):

> "In *Swift* v. *Smith,* 65 Md. 428, 5 A. 534, it was intimated that ownership by one person of all the stock in a corporation virtually suspends its operations as a corporation until the election of new officers through new stockholders purchasing from that person. Whether in the light of more recent developments in the law the principle thus announced would be accepted now (*Dollar Dry Cleansers and Dyers, Inc.* v. *MacGregor,* 163 Md. 105, 161 A. 159), need not be decided, because the question here is not whether a one man corporation could as to all matters within the sphere of its legitimate corporate operations function as a corporation, but whether such a corporation can be used by its owner to to escape the application of legal rules and principles which would reach and control him as a natural person. And in reference to that question it was said in *Bauernschmidt* v. *Bauernschmidt,* 101 Md. 162, 60 A. 437, 442: 'In *Anthony* v. *American Glucose Co.*, 146 N. Y. 407, 41 N. E. 23, the court said, "We have of late refused to be always and utterly trammeled by the logic derived from corporate existence, when it only serves to distort or hide the truth"; and in *Seymour* v. *Spring* (144 N. Y. 333, 39 N. E. 365), *supra,* "The abstraction of the corporate entity should never be allowed to bar out and prevent the real and obvious truth." '

> This principle was recognized and applied in a different situation in *Pott* v. *Schmucker*, 84 Md. 535, 36 A. 592, in which it was held that 'it was competent for a court of equity to look back of the mere artificial and formal body corporate, * * * and to treat the corporation and the individual owning all its stock and assets as identical.' In Fletcher's Cyclopedia of Corporation, sec. 44, it is said: 'It is idle to promote a corporation for the purpose of endeavoring to accomplish fraud or other illegal acts under the cloak of the corporate fiction. Where this is attempted, courts of equity, or bankruptcy, do not hesitate to tear aside the veil of corporate entity and to look beyond it and through it at the actual and substantial beneficiaries. A notable instance is found in cases where it is sought to delay, hinder and defraud creditors by means of "dummy" incorporations. The courts have uniformly held that there is no magic in incorporation and refuse to apply the doctrine of corporate entity to enable such schemes to be successful.' "

This case applies with greater force here where the corporation was conceived in fraud and in violation of trust duties when the title was transferred from the Delaware corporation to the Illinois corporation, without distributing the stock of that corporation or the proceeds thereof, and the new stock of the Illinois corporation was issued in the name of *one* person, and this person acting as the only stockholder elected the directors, is the president of the corporation, and took it upon himself to refuse the offer of $1,200,000 cash a few months prior to the maturity of the bond issue and to later plunge the corporation into bankruptcy. Under the Illinois law the "three" incorporators were to be "stockholders" who subscribed and paid for the stock (Smith-Hurd Ill. Revised Statutes Annotated, Chap. 32, Sec. 157.46). Here the subscribers were "dummies" (R. 85) and immediately they

transferred all of the shares to *one* "dummy", Pearson (R. 85) and he exercised all of the rights of the real stockholders, the bondholders. While the Illinois corporation obtained its title in 1938, the liability on the bond issue was first assumed in August, 1946 (R. 86). The purpose is evident, to bring it within the provisions of the Act. *The petition of such a corporation cannot be said to be filed in good faith.*

The opinion holds that (R. 107), want of good faith is not "breach of fiduciary integrity". This view has no foundation in law. While a mere honest intent is not good faith there must be an honest intent in order to show good faith (*Snyder* v. *Fenner*, 101 F. (2) 736, 738 C. C. A. 3).

III.

The Proceedings Were Commenced to Prevent the Distribution of the Stock to the Bondholders Upon the Maturity of the Income Bonds Which Would Have Resulted in a Merger and Enabled the Holders of the Securities to Acquire the Property Without Any Proceedings and Without the Burdensome Expenses Attached Thereto and the Court Clearly Erred When It Held That the Petition Was Filed in Good Faith.

This was not a case where the interest of the secured creditors was distinct from the interest of general creditors or the owner of the equity. The bondholders and the stockholders were the same persons, and if the persons who plunged the corporation into bankruptcy had performed their trust duties a merger would have been effected and there would have been no need for reorganization.

(a) A merger is effected when the position of debtor and creditor is united in the same person.

The Illinois law is well settled that when the interest of the debtor and creditor is united in the same person, a merger at law is effected (*Donk* v. *Alexander*, 117 Ill. 330, 337; *Re McDermott*, 115 F. (2) 582). The common law rule of merger prevails in Illinois and such a merger may only be prevented in a court of equity for equitable reasons (*Biwer* v. *Martin*, 294 Ill. 489, 493-494).

(b) Equity will enforce or prevent a merger where the intention is clear and when the prevention is in the interest of justice.

While a merger at law is effected when the superior and junior interests become united in one person, a court of equity may prevent the merger when the prevention is in the interest of equity and justice (*Forthman* v. *Deters*, 206 Ill. 159). There it was said that while it is true that the question "whether or not a merger takes place in equity depends upon the intention of the parties and the variety of other circumstances" it is also true that "a merger will be prevented by equity only, however, for the purpose of promoting substantial justice."

(c) The prevention of the merger in the instant case is not in the interest of justice.

The opinion recognizes the rule (R. 109) that the question whether a merger will be prevented depends upon equitable reason. There are no equitable reasons to prevent the merger in the instant case so as to enable the debtor to file the petition and burden the estate with the large expenses of the trustee, his counsel, the fees of other attorneys and committees and all incidental expenses.

The identical question was decided in *First Trust Co.* v. *Crooked Creek R. & Coal Co.*, 243 Fed. 450, where the court in speaking of the merger of bonds into stock, which the bondholders held, said (p. 457):

> "The making of the mortgage or trust deed in suit, then, so far as it conveyed the property of the defendant company, was a conveyance of the legal title to secure the bonds so issued; but *just how the stockholders of the company could acquire any greater or other interest under the mortgage than they, as the legal holders of the stock of the company, already possessed, is not readily conceivable.* At most, the making of the mortgage by their own board of directors, if it had any effect as to the stockholders or creditors of the corporation at all, *would only operate as a merger of the mortgage or lesser estate in the greater or legal estate already held by the stockholders.* The merger of estates is said to occur when a greater estate and a lesser coincide and meet in one and the same person, without any intermediate estate existing in another. 2 Blackstone, Com. 177 (Cooley's Ed.); volume 5, Words and Phrases, First Series, and volume 3, Second Series; Bouvier's Law Dictionary (Rawle's 3d Ed.) title 'Merger,' and cases cited. There being no intermediate or other estate existing in any other person than the stockholders of the defendant company, the equitable estate or lien created by the mortgage, if it created any estate at all, merged or was absorbed by the greater or legal estate held by the stockholders." (Emphasis ours.)

This case is cited with approval by the Illinois Supreme Court in *St. Louis Trust Co.* v. *W. C. W. R. Co.*, 334 Ill. 147, 153. The only reason the court did not apply the theory of merger is because (p. 154) "Not all of the stockholders were bondholders and not all of the bondholders were stockholders" and "to constitute a merger the estates should unite in the same person in the same right." Here, *all* of the bondholders are stockholders and all of the

stockholders are bondholders and the two estates are united in the same person in the same rights, and there may be a *pro tanto* merger (*Hill* v. *Reno*, 112 Ill. 154).

The interest of the bondholders will be best served if the merger will not be prevented and each bondholder will become a stockholder in a corporation which will own the property free and clear from the mortgage debt. What benefit would the bondholders derive from keeping the mortgage alive? The foreclosure of the mortgage would only be against themselves. Their trustee would have to allege that there was a default in the mortgage, but this default is that of the person who is himself the holder of the mortgage. One may not "eat his cake and have it too" (*Commercial Merchants Nat. Bank & Trust Co.* v. *LeTourneau*, 137 F. (2) 87, 91). There could be no benefits derived from the prevention of the merger and the completion of the reorganization proceedings, and the only result would be a liquidation in bankruptcy instead of a liquidation either by voluntary consents under the terms of the old reorganiaztion plan, or by a sale under the terms of the trust deed, both of which, however, would become unnecessary if the merger will not be prevented. It is obvious that the best interests of the bondholders will be served if the stock will be distributed pro rata among the bondholders and the affairs of the corporation will be conducted in the ordinary course, as is usual and customary in corporate matters. The fact that only 100 shares have been issued and that the bondholders will receive fractional shares is of no importance as under the Illinois law fractional shares are entitled to vote, and, if necessary, the charter may be amended to increase the number of the shares.

Conclusion.

We have shown that the decision in the instant case which affirmed the approval of the petition as filed in good faith notwithstanding the contest at the outset of the proceedings and the proof that there was no hope of reorganization and that the best that could be accomplished was liquidation, is directly contrary to the decisions of this court as construed by other circuit courts of appeal, as well as by the same circuit that rendered this opinion. We have also shown that in the instant case no reorganization was necessary and the burdening of the estate with the appointment of a trustee, the attorney for the trustees, and the fees and expenses in connection therewith was completely unnecessary. The opinion in the instant case did not even discuss the points upon which the appeal was taken and a writ of certiorari should, therefore, be granted.

Respectfully submitted,

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